

Stop and Frisk and Torture-Lite: Police Terror of Minority Communities

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The Supreme Court's decision in *Terry v. Ohio*¹ authorizes the police to "stop and frisk." The police can temporarily detain someone they suspect of a crime, and they can "pat down" suspects they think might be armed. Because the "reasonable suspicion" standard that authorizes stops and frisks is lenient, the police have wide discretion in who they detain and frisk. Even suspicion of a trivial offense like jaywalking, or spitting on the sidewalk, can give the police the authority to stop you. These "*Terry* stops" are probably the most common negative interactions that citizens have with the police (many more people get detained than arrested). For example, in New York City, in 2012, the police conducted 532,911 stops and frisks.²

Stop and frisk is, in the United States, a central site of inequality, discrimination, and abuse of power. It is a threat to democratic values and to our democracy itself. Yet stop and frisk has a strange prestige. As a legal doctrine, it has been described by a leading criminal procedure authority, as "a practically perfect doctrine."³ As a crime control policy, it has been widely embraced, especially, as we shall see, by the nation's largest police department. The purpose of this essay is to diminish that prestige by demonstrating why stop and frisk is violent and destabilizing.

I explore the expressive meaning of stops and frisks, paying special attention to frisks—police touching of people who, in the eyes of the "law," are innocent.⁴ My thesis is that stops and frisks are violent assertions of police dominance of the streets. Stop and frisk communicates to African-American men that they are objects of disdain by the state and that their citizenship is degraded.⁵ To illustrate

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¹ *Terry v. Ohio*, 392 U.S. 1 (1968).

² New York Civil Liberties Union, *Stop-and-Frisk 2012: NYCLU Briefing* (2013).

³ Stephen A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911, 911, 912 (1998).

⁴ I mean "law" in the formal, abstract sense rather than the colloquial meaning of law as law enforcement agents like the police.

⁵ I make no claim to black males being exceptional in this regard, especially compared to women of color. My focus on African-American men here is an acknowledgement that subordination is gendered and raced, so that black men might experience a different kind of race and gender subordination than, say, Latinas. For an argument that black men's problems are not worse than black women's problems, but for patriarchal reasons often perceived that way, see Paul Butler, *Black Male Exceptionalism? The Problems and Potential of Black Male-Focused Interventions*, 10 DU BOIS REV. 485 (2013).

these points, I compare stop and frisk to torture.

I know that torture is a strong claim, so as not to distract the reader, let me acknowledge that it is a simile, rather than a definition. My argument is not that stop and frisk is the same as torture. I want to demonstrate that the purpose of and harm caused by stop and frisk has something important in common with the purpose of and harm caused by torture (particularly what legal scholars have referred to as "torture-lite").⁶

My intent is not to discount the injury of people who are literally victims of torture. I want to convey a realistic sense of the violence that is inherent in stop and frisk and the effect that this violence has on its victims. I believe that the analogy to torture is helpful in this regard. I hope to persuade the reader that examining stop and frisk as torture advances our analysis of Fourth Amendment doctrine, the police practice of it, and racial subordination.

I. A NOTE ABOUT TERMS

Words have power. In 1997, the Federal Bureau of Investigation [FBI] implemented an email monitoring system that it called "Carnivore."⁷ The system was widely criticized in the press, and by privacy advocates, even though it did not provide the FBI with any new legal authority (agents still had to get a court order to target particular users). Orin Kerr jokes that if the FBI had called the system "Fluffy Bunny," rather than "Carnivore," it would not have inspired the same level of concern.⁸ In fact, the FBI ultimately did change the name of the program, to "DCS1000."⁹

Law enforcement has not made the "Carnivore" mistake in embracing "stop and frisk," or the even more innocuous sounding practice of "stop and question." The phrase connotes a minor intrusion, an inconvenience, an annoyance rather than a big deal. Indeed, in the *Terry* case, the government argued that what the police did to Mr. Terry was not even a "search" or "seizure" within the meaning of the Fourth Amendment. The Supreme Court emphatically rejected this notion:

It must be recognized that, whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a

⁶ See discussion *infra* Part IV.

⁷ See Rachel Konrad, *New Documents Shed More Light on FBI's "Carnivore"*, CNET, (November 16, 2000 5:15 PM), http://news.cnet.com/New-documents-shed-more-light-on-FBIs-Carnivore/2100-1023_3-248762.html.

⁸ Orin S. Kerr, *Internet Surveillance Law After the USA Patriot Act: The Big Brother That Isn't*, 97 NW U. L. REV. 607, 656 n.239 (2003).

⁹ *Id.* at 19.

“search.” Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a “petty indignity.” It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.¹⁰

In this Essay, I will use the terms “stop and frisk” and “seize and search” interchangeably. The former is more familiar, but the latter more accurately conveys the “serious intrusion on the sanctity of the person.”

II. TERRY AND RACIAL HUMILIATION

The National Association for the Advancement of Colored People [NAACP] believed that the *Terry* case had so much racial significance that it wanted to participate in the oral argument.¹¹ The Supreme Court denied this request,¹² and the racial consequences of its decision were not dwelt upon. The fact that Mr. Terry was African-American is never mentioned in the opinion. The Court acknowledged, however, that “minority groups, particularly, Negroes, frequently complain” about “wholesale harassment by certain elements of the police community.”¹³

Significantly, the Court cited the President’s Commission on Law Enforcement and Administration of Justice, which reported that frisking:

cannot help but be a severely exacerbating factor in police-community tensions. *This is particularly true in situations where the “stop and frisk” of youths or minority group members is “motivated by the officers’ perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.”*¹⁴

¹⁰ *Terry v. Ohio*, 392 U.S. 1, 16–17 (1968).

¹¹ *Terry v. Ohio*, 389 U.S. 950, 950 (1967) (“The motion of the NAACP Legal Defense and Educational Fund, Inc., for leave to participate in the oral argument, as *amicus curiae*, is denied.”). See also, John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court’s Conference*, 72 ST. JOHN’S L. REV. 749, 842 (1998) (“Concerns about societal reaction and consequences seem to have played roles not only in the judgments themselves, but also in the decisions to deny oral argument time to the NAACP Legal Defense Fund and to write the *Terry* opinion as only barely a race case.”).

¹² *Terry*, 389 U.S. at 950.

¹³ *Terry*, 392 U.S. at 14.

¹⁴ *Id.* at 14 n.11 (emphasis added) (quoting LAWRENCE P. TIFFANY, DONALD M. MCINTYRE, JR. & DANIEL L. ROTTENBERG, *DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT* 47–48 (Frank J. Remington ed., 1967)).

The Court's opinion does not discount this concern; it merely states that excluding evidence obtained as a result of a frisk would not resolve the problem.¹⁵

III. SEIZE AND SEARCH AS TORTURE

In *The Civil Rights Cases*,¹⁶ the Supreme Court responded to the claim that Jim Crow segregation violated the Thirteenth Amendment by saying that it would "run[] the slavery argument into the ground."¹⁷ Probably more people today would recognize that de jure segregation, despite its formal equality, was a badge and incidence of slavery. By comparing stop and frisk to torture, I might be accused of running the torture argument into the ground. But one of the lessons of *Plessy v. Ferguson*,¹⁸ which, like *Terry*, had only one dissenter, is that it is hard to see the picture when you are inside the frame.

Stop and frisk can be seen as a badge and incidence of lynching, the gendered and racialized violence directly against African-American men around the turn of the century.¹⁹ Lynching was expressive; it was not only about destroying individual bodies; it was designed to terrorize all blacks, especially African-American men. It was so effective that the nation's first civil rights organization, the National Association for the Advancement of Colored People, was formed to respond to it.

Most of the perpetrators of lynching were private citizens (although sometimes police and other government officials participated). Even if laws against torture had existed at the time, lynching would not have been considered torture, which, under most constructs, requires a state actor.²⁰ The Convention Against Torture defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having

¹⁵ *Id.* at 14–15.

¹⁶ *The Civil Rights Cases*, 109 U.S. 3 (1883).

¹⁷ *Id.* at 24.

¹⁸ 163 U.S. 537 (1896).

¹⁹ Groups other than African-American men, including black women and Jews, were also subject to lynching.

²⁰ Torture directed at blacks has been legal at points in United States history. For example, Virginia law allowed slavemasters to "burn, whip, dismember, or mutilate slaves as punishment for crimes." Likewise, in Maryland, blacks who hit whites were punished by having their ears cut off. Robin D.G. Kelley, "*Slangin' Rocks . . . Palestinian Style*": *Dispatches from the Occupied Zones of North America*, in *POLICE BRUTALITY: AN ANTHOLOGY* 21, 26 (Jill Nelson ed., 2000) (citing A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978) and MARY FRANCES BERRY, *BLACK RESISTANCE/WHITE LAW: A HISTORY OF CONSTITUTIONAL RACISM* (1971)).

committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in any official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.²¹

Seizure and search is not as violent as some forms of police brutality, like the atrocities the police perpetrated against Abner Louima,²² which included raping him with a bathroom plunger. Nobody has ever died from a stop and frisk per se, although police are allowed to use deadly force when the suspect is noncompliant and the officer believes there is a risk to life. Police routinely draw their guns during *Terry* stops in high-crime neighborhoods.²³ For example, Jeff Fagan's expert report in the recent case *Floyd v. City of New York*²⁴ found that in New York "force was 14 percent more likely to be used in stops of Blacks compared to White suspects, and 9.3 percent more likely for Hispanics."²⁵

IV. TORTURE-LITE

While all torture is "the deliberate infliction of suffering and pain," there is a continuum.²⁶ As David Luban has noted:

There is a vast difference, however, between the ancient world of torture, with its appalling mutilations, its roastings and flayings, and the tortures that liberals might accept: sleep deprivation, prolonged standing in stress positions, extremes of heat and cold, bright light and loud music—what some refer to as "torture lite."²⁷

²¹ 1465 U.N.T.S. 85, 113.

²² Robert McFadden & Joseph P. Fried, *The Louima Case: The Overview; In Harsh Testimony's Wake, Officer Accused in Torture of Louima to Plead Guilty*, N.Y. TIMES, May 25, 1999, at B4, available at <http://www.nytimes.com/1999/05/25/nyregion/louima-case-overview-harsh-testimony-s-wake-officer-accused-torture-louima-plead.html>.

²³ GREG RIDGEWAY, ANALYSIS OF RACIAL DISPARITIES IN THE NEW YORK POLICE DEPARTMENT'S STOP, QUESTION, AND FRISK PRACTICES 35–37, RAND Technical Report 534 (2007), available at http://www.rand.org/content/dam/rand/pubs/technical_reports/2007/RAND_TR534.pdf.

²⁴ 959 F. Supp. 2d 668 (S.D.N.Y. 2013).

²⁵ Expert Report of Jeffery Fagan at 66, *Floyd*, 959 F. Supp. 2d 668 (08 Civ. 01034 (SAS)), available at policeandcommunity.org/wp-content/uploads/sites/11/2013/03/Expert_Report_JeffreyFagan.pdf.

²⁶ David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1429 (2005).

²⁷ *Id.* at 1437.

Torture-lite refers to:

Interrogation techniques such as sleep deprivation, stress positions (so-called “self-inflicted pain”), isolation and sensory deprivation, temperature and dietary manipulation, noise bombardment, psychological humiliations (forced nudity, disguised rape (e.g., body cavity searches), prevention of personal hygiene, forced grooming, denial of privacy, and infested surroundings), threats against self or family, witnessing or hearing the abuse of others, attacks on cultural values or religious beliefs, and mock executions,²⁸

The cruelty is “lite” because it does not leave physical marks on the body and the pain seems less severe than traditional torture.

As Susan Sontag observed about the torture, by American soldiers, of the prisoners at Abu Ghraib:

Remember: we are not talking about that rarest of cases, the “ticking time bomb” situation, which is sometimes used as a limiting case that justifies torture of prisoners who have knowledge of an imminent attack. This is general or nonspecific information-gathering All the more justification for preparing prisoners to talk. Softening them up, stressing them out -- these are the euphemisms for the bestial practices.²⁹

The purpose of torture-lite is “to induce hopelessness and despair Small gestures of contempt—facial slaps and frequent insults—drive home the message of futility. Even the rough stuff, such as ‘walling’ and waterboarding, is meant to dispirit, not to coerce.”³⁰

Stop and frisks are like the torture-lite that some military police officers conducted at Abu Ghraib. They demonstrate humiliation and control. I do not mean that the police would be formally guilty in a U.S. court or under international law of a crime or a human rights violation. They would not be found guilty because of the exception for “lawful sanctions” and probably because of the “intent” requirement and that the pain they would have caused would not be “severe” enough. My claim is that the police practice of stops and frisk in minority communities causes injuries similar to torture-lite, and have the same kinds of “benefits.”

²⁸ Beth Van Schaack, “Torture-Lite”, INTLAWGRRLS (Jul. 27, 2009, 6:02 AM), <http://intlawngrls.com/2009/07/torture-lite.html>.

²⁹ Susan Sontag, *Regarding the Torture of Others*, N.Y. TIMES, (May 23, 2004), <http://www.nytimes.com/2004/05/23/magazine/regarding-the-torture-of-others.html>.

³⁰ M. Gregg Bloche, *Torture-Lite: It's Wrong, and It Might Work*, WASH. POST (May 27, 2011), http://www.washingtonpost.com/opinions/torture-lite-its-wrong-and-it-might-work/2011/05/19/AGWIVzCH_story_1.html.

In the District of Columbia, the police, while driving squad cars, are under orders to flash their cruise lights (the bar of lights on top of the car).³¹ The practice was commanded by former police Chief Charles Ramsey after he visited Israel, where police also do this.³² Many drivers report being confused: you are never quite sure, when a squad car with flashing lights is behind you, whether the police are ordering you to pull over. In a city that has more police per capita than any other city in the country and where every police car is supposed to display flashing lights, a more symbolic concern has also been expressed: What is the effect on a community when state agents make their vigilance—their patrols—so evident? For many, it is disquieting. It creates a heightened and pervasive sense of alarm.

The practice of seize and search has this same effect on black men, but it is much more pronounced. The sight of any police officer is a signal to any black man that he is subject to being detained and searched. The instinct is to avoid the intrusion, but the standard is so low, and so arbitrary, that sometimes it is not clear what he can do. His best option is to avoid being detected by the police and, if he is noticed, to communicate deference.

Professor David Luban has identified five aims of torture: victor's cruelty, extracting confessions, intelligence gathering, punishment, and terror.³³ Seize and search serves each of the latter four instrumental ends, serving the first two explicitly.³⁴ When the police engage in a stop, they question the person about the crime, which occasioned the "reasonable suspicion" for the stop ("extracting confessions"), and they seek any other incriminating information ("intelligence gathering"). For example, under the "plain touch" doctrine, when they conduct their frisk, in addition to seizing guns and other weapons as permitted by *Terry*, they can also seize evidence other than guns if its incriminating character is immediately apparent.³⁵

Consistent with Professor Luban's description of torture's objectives, stop and frisk punishes black men, its most consistent repeat targets. It punishes them for being black and male. In "99 Problems," Jay-Z is asked by the officer who has stopped him, "Son, do you know what I'm stopping you for?"³⁶ Jay-Z replies "Because I'm young and I'm black and my hat's real low."³⁷ The legal scholar Bennett Capers writes, "stops are a dressing down, a public shaming, the very stigmatic harm that the Court has often, but not often enough, found troubling.

³¹ David A. Fahrenthold, *D.C. Police Keeping Cruiser Roof Lights Flashing for Visibility*, WASH. POST, Jan. 25, 2003, at B02.

³² *Id.*

³³ Luban, *supra* note 25, at 1429–36.

³⁴ *Id.* at 1431.

³⁵ *Id.* at 1430.

³⁶ JAY-Z, *99 Problems*, on THE BLACK ALBUM (Roc-A-Fella Records 2003, Def Jam Records 2003) (lyrics available at ORIGINAL HIP-HOP (RAP) LYRICS ARCHIVE, http://www.ohhla.com/anonymous/jigga/theblack/99_probs.jyz.txt (last visited Oct. 21, 2014)).

³⁷ *Id.*

They are something akin to the status punishment that the Court, in its better moments, has found unconstitutional.”³⁸

V. STOP AND FRISK AS TERROR

Black’s Law Dictionary defines “terrorism” as “[t]he use or threat of violence to intimidate or cause panic”³⁹ This is also how the police use their *Terry* power to seize and search. During the *Floyd* trial, a former police captain testified that Ray Kelly, then the city’s police commissioner, stated that stop and frisk focused on young men of color because Kelly “wanted to instill fear in them, every time they leave their home they could be stopped by the police.”⁴⁰

In order to understand how stop and frisk operates as a form of terror, one might view the New York Police Department [NYPD] from the perspective of a young African-American or Hispanic. In 2012, the New York Times published an article about Tyquan Brehon, an African-American male who claimed that he had been “unjustifiably stopped by the police more than sixty times” before he turned eighteen years old.⁴¹ Brehon explains that he “did whatever he could to avoid the police, often feeling as if he were a prisoner in his home.”⁴² The consistent behavior of the NYPD had created an automatic behavioral response. The mere presence of the police might cause Brehon, at least, to avoid the police while walking in his neighborhood, and at worst, to confine himself to his own home in order to completely avoid the risk of being stopped and frisked.

Now, consider that many other Black and Latino men share Brehon’s response to stop and frisk. They have shifted their otherwise innocent behavior in fear of being stopped and frisked. As an example, during the stop and frisk litigation in the spring of 2013, one of the class members, David Floyd, testified that

³⁸ I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 68–69 (2009).

³⁹ *Terrorism*, BLACK’S LAW DICTIONARY (9th ed. 2009).

⁴⁰ Joseph Goldstein, *Kelly Said Street Stops Target Minors, Senator Justifies*, N.Y. TIMES (April 1, 2013) <http://www.nytimes.com/2013/04/02/nyregion/kelly-intended-frisks-to-instill-fear-senator-testifies.html>. Commissioner Kelly subsequently submitted an affidavit to the court denying that he had ever suggested that Black and Latino men were being targeted for stop and frisk. *Id.* The Court’s opinion found that in fact Black and Latino men were targeted. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 589 (2013).

⁴¹ Julie Dressner & Edwin Martinez, *The Scars of Stop-and-Frisk*, N.Y. TIMES (June 12, 2012), http://www.nytimes.com/2012/06/12/opinion/the-scars-of-stop-and-frisk.html?_r=0.

⁴² *Id.*

[t]he first time the police stopped and then frisked him on his block in the Bronx, [he] remembered wanting only “to get home” and “be in my own space.” The second time it happened, Mr. Floyd testified, he was left with the impression that “I needed to stay in my place, and my place was in my home.”⁴³

Mr. Floyd’s sense that, in order to avoid violent encounters with the police, he needed to stay at home is the type of result terrorists hope for. An innocent individual restricts his freedom out of fear that he will be terrorized once again. This community-wide behavioral change is the essence of terrorism.

Many law-abiding African-American men have stories about how fear of the police modifies their behavior. Professor James Forman is one of the founders of a high school for at-risk students, mainly African-American, in the District of Columbia. He observes that when these students see the police approach, they immediately “assume the position,” without even being asked.⁴⁴ Harvard professor Henry Louis Gates, long before the famous incident in which he was arrested in his home, wrote that, whenever he moved to a new city, he would go and introduce himself to the police, so he would not be stopped.⁴⁵ Randall Kennedy, a Harvard law professor, does Professor Gates one better: he offers to volunteer at police stations so that they will know him. A football coach in Brownsville told the New York Times that his players wear their bright orange helmets on the streets at night so the police will leave them alone. Otherwise, he said, “[m]y players were always calling me saying ‘Coach, the police have me.’”⁴⁶ Bennett Capers, who is black, has spoken of preferring to walk through his own neighborhood in Brooklyn with his white husband, because being accompanied by a white person communicates that he is safe.⁴⁷

In another context, we might describe these behavior modifications by saying “the terrorists won.” Perhaps a more familiar example of terrorism makes this point easier to understand. When the Tsarnaev brothers allegedly detonated bombs at the Boston Marathon in April 2013, many Americans immediately considered it

⁴³ Joseph Goldstein, *A Focus on 3 Encounters in a Stop-and-Frisk Trial*, N.Y. TIMES, (Mar. 19, 2013), <http://www.nytimes.com/2013/03/19/nyregion/focus-on-3-encounters-as-trial-begins-on-stop-and-frisk-tactic.html>.

⁴⁴ James Forman Jr., *Arrested Development: Why Conservatives Should Oppose Racial Profiling*, NEW REPUBLIC, Sept. 10, 2001 at 24.

⁴⁵ Henry Louis Gates, *Thirteen Ways of Looking at a Black Man*, THE NEW YORKER, Oct. 23, 1995, available at http://www.newyorker.com/archive/1995/10/23/1995_10_23_056_TNY_CARDS_000372419.

⁴⁶ Ray Rivera, Al Baker & Janet Roberts, *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES (Jul. 11, 2010), <http://www.nytimes.com/2010/07/12/nyregion/12frisk.html?pagewanted=all>.

⁴⁷ I. Bennett Capers, *The Crime of Loving: Loving, Lawrence, and Beyond*, in *LOVING V. VIRGINIA IN A POST-RACIAL WORLD: RETHINKING SEX, RACE, AND MARRIAGE* 114, 126–27 (Kevin Maillard & Rose Cuison Villazor eds., 2012).

an act of terror.⁴⁸ While several people lost their lives and many more were wounded, a frequently expressed sentiment was that the terrorists “win” only if they make us fearful and cause us to change our behavior.⁴⁹ If all future Boston marathons were cancelled, or registration for the marathon dramatically declined as a result of the bombing, or if Bostonians began to flee the city entirely for fear of another bombing, the intent of the terrorist behavior would have been realized. But that did not happen. Instead, Boston and the entire country came together to reject the potential impact of terror.

What we can extract from this example is that terror draws its power not necessarily from the intent of its actors, terrorists, but from the impact on its victims. Terrorism is successful when it creates the kind of fear that controls the activities of the terrorized. That the Supreme Court, in *Terry*, gave the police this kind of power over minority communities is no accident. As the final section of this essay explains, social control over people of color is one of the defining attributes of United States law.

VI. FROM SLAVERY TO STOP AND FRISK: A HISTORICAL LINEAGE OF RACIAL SUBORDINATION

Stop and frisk fits into a historical lineage of racial subordination of African-Americans. I use racial subordination here to distinguish it from the more narrow idea of racial discrimination. Racial subordination is the use of social systems, including law, to oppress or control a racial minority. Professor Roy Brooks writes that “[r]acial subordination is about more than just old-fashion racism, or racial antipathy. It is also about the values, behaviors, and attitudes society deems acceptable, legitimate, hegemonic, and worthy of respect.”⁵⁰

The origin of racial subordination, of Blacks specifically, in the United States is slavery. Slavery remains the most prominent example of American law as an instrument of racial subordination. John Hope Franklin writes that:

After the colonies secured their independence and established their own governments, they did not neglect the matter of slavery in the laws that they enacted. Where slavery was growing, as in the lower South in the late eighteenth and early nineteenth centuries, new and more stringent laws were enacted. All over the South, however, there emerged

⁴⁸ David Jackson, *Obama to Visit Boston Thursday, Calls Attack Terrorism*, USA TODAY (Apr. 16, 2013, 8:57 PM), <http://www.usatoday.com/story/news/2013/04/16/obama-boston-marathon-bombing-remarks/2087565/>.

⁴⁹ Ezra Klein, *‘If You Are Scared, They Win. If You Refuse to be Scared, They Lose,’* WASH. POST (Apr. 16, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/04/16/if-you-are-scared-they-win-if-you-refuse-to-be-scared-they-lose/>.

⁵⁰ Roy L. Brooks, Conley and Twombly: *A Critical Race Theory Perspective*, 52 HOW. L.J. 31, 41 (2008).

a body of laws generally regarded as the Slave Codes, which covered every aspect of the life of the slave. There were variations from state to state, but the general point of view expressed in most of them was the same: slaves are not people but property; laws should protect the ownership of such property and should also protect whites against any dangers that might arise from the presence of large numbers of slaves. It was also felt that slaves should be maintained in a position of due subordination in order that the optimum of discipline and work could be achieved.⁵¹

Of course, the formal legal system was not the only mechanism of control. Professor Eduardo Bonilla-Silva reminds us that “during slavery whites used the whip, overseers, night patrols, and other highly repressive practices along with some paternalistic ones to keep blacks ‘in their place.’”⁵²

After the Civil War and the quickly abandoned attempt at reconstruction, whites again turned to racial subordination tactics to control the newly freed blacks. They used both legal tactics and tactics outside the law. These tactics included the disfranchisement of blacks in places where blacks had garnered voting strength,⁵³ the implementation of Jim Crow laws, and the use of lynching as “terroristic forms of social control.”⁵⁴ Due to the diligent fight of many blacks and non-black allies in the early twentieth century, the system of Jim Crow and lynching slowly subsided, but this did not end the system of racial subordination. Manning Marable writes:

The informal, vigilante-inspired techniques to suppress Blacks were no longer practical. Therefore, beginning with the Great Depression and especially after 1945, white racists began to rely almost exclusively on the state apparatus to carry out the battle for white supremacy. . . . The police forces of municipal and metropolitan areas received a *carte blanche* in their daily acts of brutality against Blacks. The Federal and state government carefully monitored Blacks who advocated any kind of social change. . . . The criminal justice system, in short, became the modern instrument to perpetuate white hegemony.⁵⁵

⁵¹ JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 124 (7th ed. 1994).

⁵² EDUARDO BONILLA-SILVA, *WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA* 103–04 (2001).

⁵³ Franklin & Moss, *supra* note 51, at 254–55.

⁵⁴ BONILLA-SILVA, *supra* note 52, at 104; *see also* FRANKLIN & MOSS, *supra* note 51, at 312 (noting that “[i]n the last sixteen years of the nineteenth century there had been more than 2,500 lynchings, the great majority of which were of African Americans.”).

⁵⁵ MANNING MARABLE, *HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA* 120 (1983).

It is this transition from overt legal and extra-legal mechanisms of racial subordination to the more subtle use of law enforcement as the mechanism of racial subordination that connects stop and frisk to a lineage of racial subordination tactics.

This is not to suggest that all police officers are racists, in the sense that they have animus towards Blacks or Hispanics solely on the basis of their race. Racial animus is not necessary to participate in or be an accomplice to a racial subordination system. Bonilla-Silva explains this phenomena, i.e. how police officers without racial animus can be a part of a system of racial subordination, by suggesting that “police officers live in a ‘cops’ world’ and develop a cop mentality.”⁵⁶ He explains that a “cops’ world is a highly racialized one; minorities are viewed as dangerous, prone to crime, violent, and disrespectful.”⁵⁷

The relationship between police activity and racial subordination provided the basis for the trial court decision in the *Floyd* case. Judge Scheindlin found that the “plaintiffs showed that the City, through the NYPD, has a policy of indirect racial profiling based on local criminal suspect data,” and that “plaintiffs showed that senior officials in the City and at the NYPD have been deliberately indifferent to the intentionally discriminatory application of stop and frisk at the managerial and officer levels.”⁵⁸ Based on these findings, Judge Scheindlin found that the plaintiffs’ Fourteenth Amendment rights under the Equal Protection Clause were violated.

Accordingly, the use of stop and frisk as a mechanism of racial subordination is not an isolated example of overreach by rogue police officers, or even a rogue police force, but is instead a mechanism deeply connected to the history of racial subordination. Some readers may find it difficult to make the mental connection between slavery, lynching, police brutality, and stop and frisk as all part of the same racial subordination scheme. This is largely due to the idea that the prior mechanisms seem motivated by actual racial animus, but stop and frisk appears to serve some legitimate non-racial purpose. That is to say slavery, lynching, and racialized police brutality are wrong because the bad actors acted out of ill will toward blacks, but stop and frisk is different because it is the misapplication of an otherwise legitimate police activity. While this line of reasoning demonstrates a real difference between modern forms of racial subordination and older forms of the same, it misses the point that all of these mechanisms of racial subordination serve the same larger purpose of “[k]eeping [Blacks] in their place,” as Bonilla-Silva writes. When we focus on the personal feelings of the actors engaged in the racial subordination tactics—i.e. is this officer behaving this way because he hates black people or because he views himself as protecting his community—we miss the forest for the trees; we miss the system that is at work because we are focused

⁵⁶ BONILLA-SILVA, *supra* note 52, at 108.

⁵⁷ *Id.*

⁵⁸ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 660 (2013).

on the subordinator, instead of the effect on the subordinated.

An African-American mother, writing on a blog about raising children, said this about her son's experience growing up in New York City:

The saddest part of all of this is he'd begun to become "immune" to being stopped. He, like too many other men of color in this city, had become desensitized to being treated criminally. They take it as par for the course; they shrug it off and most will laughingly share their war stories. But listen closely and you can hear anger comingled with humiliation and a weary, reluctant acceptance.⁵⁹

The Supreme Court got it right in *Terry* when it noted that frisks might be "motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets."⁶⁰ The "weary, reluctant acceptance" of humiliation is how torture-lite succeeds. It induces in its victims a learned helplessness. One African-American resident of Brooklyn told the New York Times that residents "fear the police because you can get stopped at any time."⁶¹ Professor Luban describes the torturer's work as inflicting "pain one-on-one, deliberately, up close and personal, in order to break the spirit of the victim—in other words, to tyrannize and dominate the victim."⁶²

Stop and frisk does not (usually) leave a physical mark, but as one study of torture-lite noted, "psychological manipulations conducive to anxiety, fear, and helplessness in the detainee do not seem to be substantially different from physical torture in terms of the extent of mental suffering they cause, the underlying mechanisms of traumatic stress, and their long-term traumatic effects."⁶³

The stories of many black men who are subject to seize and search are the stories of men who have had their spirits broken. They are afraid of the police. This is, in fact, its point. Seize and search, like torture-lite, demonstrates who is in charge, and the violent consequences of dissent.

⁵⁹ Dionne Grayman, *For Our Sons Police Stops Are a Part of Growing Up*, WENEWS (Oct. 2, 2010), <http://www.womensenews.org/story/sisterspace/101002/our-sons-police-stops-are-part-growing>.

⁶⁰ *Terry v. Ohio*, 392 U.S. 1, 14 n.11 (1968) (citing TIFFANY, MCINTYRE & ROTTENBERG, *supra* note 14).

⁶¹ Rivera, Baker & Roberts, *supra* note 46.

⁶² Luban, *supra* note 26, at 1430.

⁶³ Metin Başloğlu, Maria Livanou & Cvetana Cmobaric, *Torture vs. Other Cruel, Inhuman, and Degrading Treatment: Is the Distinction Real or Apparent?*, 64 ARCH. GEN. PSYCHIATRY 277, 284 (2007), available at <http://archpsyc.ama-assn.org/cgi/content/full/64/3/277>.

